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Supreme Court, U.S.
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NO. _____

IN THE UNITED STATES SUPREME COURT

GRANITE STATE OUTDOOR ADVERTISING, INC.,

Petitioner,

v.

CITY OF ROSWELL, GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE GEORGIA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether an individual who submits an application to engage in a First Amendment protected activity may challenge the licensing scheme as an invalid prior restraint if the application in question is denied based on unrelated grounds.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

The parties to the proceeding are properly set forth in the case caption. Petitioner Granite State Outdoor Advertising, Inc. has no parent corporation and no publicly held company owns ten percent or more of the corporation's common stock.

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OPINIONS BELOW

The opinion of the Georgia Supreme Court is reported as *Granite State Outdoor Advertising, Inc. v. City of Roswell*, 658 S.E.2d 587 (Ga. 2008).[1] The oral ruling of the Superior Court of Fulton County, Georgia is unreported.

JURISDICTION

The Georgia Supreme Court entered judgment on March 10, 2008. A Motion for Reconsideration was denied on April 11, 2008. The Georgia Supreme Court had jurisdiction over Petitioner's appeal pursuant to Article VI, Section 6, Paragraph 2 of the Georgia Constitution. Jurisdiction in this Court is invoked pursuant to 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides that "Congress shall make no law . . . abridging the freedom of speech or of the press . . ." and this restriction has been extended to the states and their political subdivisions by the Fourteenth Amendment.

Section 1983 of Title 42 of the United States Code states that any person that "subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable

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[1] The attached Appendix includes the Georgia Supreme Court decision (1a-11a), and the transcript of the Superior Court's oral ruling (12a-25a).

to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT

I. OVERVIEW OF THE CASE

Petitioner Granite State Outdoor Advertising, Inc. ("Granite State") filed suit against Respondent City of Roswell, Georgia ("City"), alleging that the City's Sign Ordinance violated Granite State's and others' free speech rights. Petitioner alleged in its Complaint that the Sign Ordinance was facially invalid because, *inter alia*, it failed to contain the necessary procedural safeguards, was content-based, and afforded City officials unbridled discretion in processing sign applications. The parties eventually filed competing motions for summary judgment. The Superior Court granted the City's motion and found that Granite State lacked standing to challenge certain code provisions, and that all others were constitutional. (12a-25a).

The Georgia Supreme Court affirmed in part and reversed in part the decision of the lower court. (10a). The court upheld the decision of the lower court that Petitioner only had standing to challenge certain provisions of the Sign Ordinance, but reversed the lower court's finding that Granite State had standing to challenge the licensing scheme contained in the Sign Ordinance. (9a).

II. FACTUAL BACKGROUND OF THE CASE

Granite State is in the business of developing sign locations to be used for the dissemination of both commercial and noncommercial speech. (1a).

Over the course of May and June 2003, pursuant to the Roswell Sign Ordinance, Granite State submitted several application packages seeking to erect signs within the City. *Id.* During this period, the City enforced a Sign Ordinance that required prior approval before any signs could be posted. *See* Sign Ordinance, § 22.2. In addition, a fee had to be paid by an applicant at the time application was made. *Id.* at § 22.5. Despite the foregoing, no non-illusory time limits were imposed on officials within which to approve or deny sign applications. *Id.* at § 22.22.

The Sign Ordinance also vested unlimited discretion in City officials to allow or deny signs. *E.g.*, *id.* at §§ 22.3(g) (allowing officials to request unspecified "additional information" as a prerequisite to obtaining a sign permit); 22.12(a) (allowing officials to ban signs deemed to be "calculated to mislead the public as to anything sold, services to be performed, or information disseminated"); 22.24(e) (giving the Design Review Board the discretion to approve off-premises signs without reference to objective standards).

The City rejected Granite State's applications via letter on the ground that the proposed signs were not in compliance with the Ordinance. (1a). On July 16, 2003, the City enacted a Moratorium on the acceptance of sign applications so that the City could consider new sign regulations. (2a). While the Moratorium was in place, Granite State attempted to submit two additional sign applications which the City refused to accept. *Id.* Following the expiration of the Moratorium in September of 2003, the City revised its Sign Ordinance. *Id.*

III. PROCEEDINGS BELOW

After the denial of its initial applications Granite State filed suit in the Superior Court of Fulton County challenging the constitutionality of Roswell's Sign Ordinance. (2a). Granite State alleged that the Sign Ordinance violated the free speech guarantees of the Georgia and U.S. Constitutions. *See generally* Amended Complaint.

Both parties eventually filed dispositive motions. Granite State filed a motion for partial summary judgment arguing that, because the City was enforcing unconstitutional sign restrictions at the time the applications were submitted, the signs should be authorized and a trial scheduled to determine the appropriate amount of damages. (13a). The City filed a cross-motion for summary judgment as to all issues. *Id.*

On April 12, 2007, Superior Court Judge Constance Russell issued an oral ruling as to the parties' cross-motions. See April 12, 2007 Oral Ruling (12a-25a). After first holding that the City's post-application amendments to its Sign Ordinance did not moot the case, the court addressed the issue of standing. (14a-16a). Although the court cursorily identified several Georgia decisions that govern the standing inquiry, it ultimately relied exclusively on an aberrant *federal* court decision. (17a-19a).

After conducting these jurisdictional inquiries, the court proceeded to analyze the provisions of the Ordinance and Moratorium which it found Granite State had standing to challenge. (19a-25a). First, the court concluded that the Ordinance, despite being littered with provisions that explicitly regulated signs based on content, was not content-

based because the purpose clause did not *expressly state* that the City *intended* to regulate by content. (21a). Next, the court held that the Ordinance's failure to contain the requisite procedural safeguards in the permitting procedure was inconsequential because an aggrieved applicant could bring an action for mandamus to obtain a wrongfully withheld permit. (22a-23a).

Next, the court found that, even *assuming* that all of Granite State's remaining constitutional claims against both the Sign Ordinance and Moratorium were meritorious, the deficient provisions could be severed, and the remaining constitutional provisions would still preclude the proposed signs. (23a-24a). Ultimately, the court held that Granite State was not entitled to permits for its signs (which would have purportedly been precluded by constitutional provisions) and thus granted summary judgment to the City. (24a-25a).

On appeal, the Georgia Supreme Court reached two conclusions. First, the court held that the lower court was correct in finding Granite State had standing to contest only those provisions of the sign ordinance that had caused injury to Granite State. (8a). Second, the court found that Granite State could not challenge the Sign Ordinance's permitting requirement because it had not suffered an injury-in-fact under this provision. (9a). Both of these conclusions were based upon federal court decisions. *See* 2a-4a, 8a-9a. Therefore, the Supreme Court reversed the lower court's substantive analysis of the licensing provisions. (10a).

REASONS FOR GRANTING THE PETITION

As this Court noted in *Staub v. City of Baxley*, 355 U.S. 313, 322, 78 S. Ct. 277, 282 (1958), an ordinance that "makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official – as by requiring a permit or license which may be granted or withheld in the discretion of such official – is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms." Furthermore, precedent from this Court has long established that a litigant has standing to challenge a prior restraint on speech irrespective of whether that litigant has applied for a permit or license under the ordinance in question. *E.g.*, *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 755-56, 108 S. Ct. 2138, 2143 (1988); *Staub*, 355 U.S. at 319, 78 S. Ct. at 281.

Despite the fact that the Roswell Sign Ordinance relied upon to deny Granite State's applications required the issuance of a permit before one could exercise their First Amendment right to use a sign, the Georgia Supreme Court found that Granite State lacked standing to argue that the Ordinance operated as a prior restraint on speech. (9a). The Georgia court reached this conclusion because Granite State did not suffer an injury-in-fact under the permitting procedure of the ordinance. *Id.* In reaching this decision, the court relied on recent standing jurisprudence from the Eleventh Circuit and, surprisingly, case law from this court as well, which it claimed supported its conclusion that Granite State lacked standing. *See* 2a-4a; 9a. Long established precedent from this Court, however, does not support this conclusion. As a result, the Georgia

Supreme Court's decision has created a more stringent standard for access to First Amendment protection than permitted by this Court. Such a result is not permissible. *Staub*, 355 U.S. at 319-20, 78 S. Ct. at 280-81. The ability of a litigant to challenge a licensing scheme that regulates a First Amendment protected activity is a critically important matter. Therefore, this Court should grant this petition in order to rectify this error.

I. THE GEORGIA SUPREME COURT'S STANDING DECISION IS CONTRARY TO THIS COURT'S STANDING JURISPRUDENCE INVOLVING FIRST AMENDMENT ACTIVITIES.

While a plaintiff must generally demonstrate that it has suffered an injury-in-fact, that there is a causal connection between the injury and the conduct complained of, and that it is likely that the injury will be redressed by a favorable decision,[2] this Court created an exception to these general rules of standing beginning in *Thornhill v. Alabama*, 310 U.S. 88, 60 S. Ct. 736 (1940), where this Court noted that the very existence of some broadly written statutes may have such a deterrent effect on free expression that they are subject to challenge even by a party whose own conduct may be unprotected.

As this Court established in *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 799, 104 S. Ct. 2118, 2125 (1984), this "exception from the general rule is predicated on 'a judicial prediction or assumption that the statute's

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[2] *See, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 2136 (1992).

very existence may cause others not before the court to refrain from constitutionally protected speech or expression.'" (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 612, 93 S. Ct. 2908, 2916 (1973)).

In *Broadrick* this Court held "[i]t has long been recognized that the First Amendment needs breathing space and that statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society." 413 U.S. at 611, 93 S. Ct. at 2915. Moreover, this Court noted that it "has altered its traditional rules of standing to permit – in the First Amendment area – 'attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.'" *Id.* at 612, 93 S. Ct. at 2916 (citing *Dombrowski v. Pfister*, 380 U.S. 479, 486, 85 S. Ct. 1116, 1121 (1965)). Therefore, litigants "are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Broadrick*, 413 U.S. at 612, 93 S. Ct. at 2916.

The overbreadth doctrine was developed "to enable persons who are themselves unharmed by the defect in a statute nevertheless to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, ***in other situations not before the Court***." *Board of Trustees v. Fox*, 492 U.S. 469, 484, 109 S. Ct. 3028, 3037 (1989) (emphasis added). The very purpose of

the overbreadth standing doctrine is to permit challenges to regulatory schemes that infringe on First Amendment speech rights even when the party before the court has not suffered injury from every one of the challenged portions of the regulation.

As Petitioner noted above, this Court's decisions in *Staub* and *Lakewood* unequivocally demonstrate that Granite State need not have submitted an application for a permit in order to have standing to challenge the licensing provisions of the Roswell Sign Ordinance. *Lakewood*, 486 U.S. at 755-56, 108 S. Ct. at 2143. In *Lakewood*, this Court held that a party "who is subject" to a discretionary procedure has standing to challenge it "without the necessity of applying for, and being denied, a [permit]." *Id.* at 755, 108 S. Ct. at 2143. Thus Granite State has standing to bring its challenge to the City's licensing scheme irrespective of whether it submitted an application.

Similarly, in *Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton*, 536 U.S. 150, 122 S. Ct. 2080 (2002), the plaintiffs challenged a door-to-door solicitation ordinance that required solicitors to register by providing their name and other information and to obtain a permit. The plaintiffs "did not apply for a permit" and the record did not "show that any application has been denied or that any permit has been revoked." *Id.* at 156, 122 S. Ct. at 2084. Despite this lack of "direct injury" this Court had no difficulty discarding the entire ordinance. This Court held that the ordinance was invalid, *inter alia*, because it essentially banned anonymous political activity. This aspect of the law was not even challenged by the plaintiff Jehovah's Witnesses. *Id.* at 166 n.14, 122 S. Ct. at 2089. The

Court held that "[a]lthough the Jehovah's Witnesses do not themselves object to a loss of anonymity, they bring this facial challenge in part on the basis of overbreadth. We may, therefore, consider the impact of this ordinance on the free speech rights of individuals who are deterred from speaking because the registration provision would require them to forgo their right to speak anonymously." *Id.* (citing *Broadrick*, 413 U.S. at 612, 93 S. Ct. at 2915-16). Clearly, a plaintiff simply does not need to participate in an improper permitting scheme in order to challenge it as contrary to the First Amendment. As such, Granite State had standing to raise its claim that the City's sign permitting procedure granted unfettered discretion and lacked procedural safeguards.

This Court has never held, as the Georgia Supreme Court did below, that a party's decision to submit an application to engage in a First Amendment protected activity strips that party of its ability to challenge the licensing scheme. Yet the Georgia Supreme Court, based on a misreading of federal jurisprudence,[3] did just that, holding that because Granite State did not suffer a specific injury-in-fact under the permitting scheme of the Ordinance once its application was submitted, it no longer had standing to bring its claims that the licensing scheme was an invalid prior restraint. (9a) (citing

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[3] Georgia courts have explicitly adopted Supreme Court decisions to govern free speech issues. *See Union City Bd. of Zoning Appeals v. Justice Outdoor Displays, Inc.*, 467 S.E.2d 875, 879-83 (Ga. 1996) (adopting this Court's analysis in *Metromedia* and rejecting Eleventh Circuit case law to the contrary).

federal case law). As there is no disputing the fact that Granite State was subject to the permitting requirement found in the Roswell Sign Ordinance, the court's refusal to afford Granite State standing to bring its First Amendment challenge was erroneous.

This holding of the Georgia Supreme Court is contrary to numerous decisions from this Court. *E.g.*, *Burson v. Freeman*, 504 U.S. 191, 210 n.13, 112 S. Ct. 1846, 1857 (1992); *Secretary of State v. Joseph H. Munson Co.*, 467 U.S. 947, 954-59, 104 S. Ct. 2839, 2845-48 (1984) (recognizing standing of for-profit fundraiser to challenge solicitation statute impact on First Amendment rights of charities); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 504 n.11, 101 S. Ct. 2882 (1981) (recognizing enormous benefit of allowing "commercially interested" parties to make overbreadth challenges).

This Court's decision in *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 112 S. Ct. 2395 (1992), further demonstrates this point. There, the plaintiff submitted a permit application, and was only charged $100 for the parade permit, far less than the actual costs and less than what the Supreme Court had deemed appropriate in prior cases. *Id.* at 127, 132, 112 S. Ct. at 2399, 2402. Nevertheless, despite the fact that the plaintiff suffered no direct injury under certain provisions of the ordinance, the Court allowed a facial challenge to the ordinance's licensing scheme, finding the facts of the applicant's situation were,

> irrelevant to this facial challenge. Facial attacks on the discretion granted a decisionmaker are not dependent on the facts surrounding any particular permit decision. *See Thornhill v.*

> *Alabama*, 310 U.S. 88, 97, 60 S. Ct. 736 (1940). Accordingly, the success of a facial challenge on the grounds that an ordinance delegates overly broad discretion to the decisionmaker rests not on whether the administrator has exercised his discretion in a content-based manner, but whether there is anything in the ordinance preventing him from doing so.

Id. at 133 n.10, 112 S. Ct. at 2403. The Court reiterated time and again that it was proceeding on the plaintiffs' facial challenge to the ordinance. *E.g.*, 505 U.S. at 129 ("facial challenge"), 130 ("facially invalid"), 131 ("facial challenge"), 112 S. Ct. at 2400-02. Thus, *Nationalist Movement* also supports Granite State's ability to bring a challenge to the licensing scheme at issue in this case.

Similarly, in *Reno v. ACLU*, 521 U.S. 844, 861, 117 S. Ct. 2329, 2333 (1997), rather than limiting the standing of the plaintiffs to challenge only provisions of the Communications Decency Act that had been cited against them, the Court allowed the many plaintiffs to facially challenge the regulation although the law had never been enforced against anybody. The Court had no problem affording the 47 plaintiffs standing to bring a facial overbreadth challenge to the Act. The Court focused on the chilling effect on speech that a content-based criminal statute invariably has. 521 U.S. at 871-72, 117 S. Ct. at 2344 (speech restriction that is content-based and vague has "obvious chilling effect on free speech"). In the end, the Court invalidated all but a sliver of the entire Act. *Id.* at 882-83, 117 S. Ct. at 2350 (saving redundant ban on obscene material).

More recently in *City of Littleton v. Z.J. Gifts D-4, L.L.C.*, 541 U.S. 774, 124 S. Ct. 2219 (2004), this Court reaffirmed that a plaintiff's facial challenge under the overbreadth doctrine is not limited to the discrete provision(s) of a regulatory scheme under which it suffered injury. The Court considered the plaintiff's facial challenge to the judicial review provisions of the Littleton ordinance even though the plaintiff never attempted to obtain judicial review of the city's citation. *Id.* at 776, 782-84, 124 S. Ct. at 2222, 2225-26. In *Littleton*, the plaintiff opened and operated an adult business in an unauthorized location in the city without attempting to obtain a license required by the municipal ordinance. *Id.* at 776, 124 S. Ct. at 2222. Instead of applying for a license or submitting to *any* of the requirements of the regulations, the plaintiff facially challenged the entirety of the regulatory scheme, and was granted standing to do so. *Id.*

This Court *did not limit the plaintiff's facial standing to the specific provision* that rendered the plaintiff's use unlawful under the city's regulations. *Id.* The Court expressly noted that Z.J. Gifts' business violated Section 3-14-3(B) of the regulations, a content-neutral provision that prohibited establishing an adult business "within 500 feet of a church and day care center." *Id.* Had this Court applied the Georgia Supreme Court's interpretation of standing, Z.J. Gifts' standing would have been limited to challenging only Section 3-14-3(B) of Littleton's ordinance. Rather than adopt such an approach, this Court allowed Z.J. Gifts to facially challenge the entire regulatory scheme, including the provision providing applicants with access to judicial review, *even though Z.J. Gifts had never attempted to*

avail itself of this specific provision. *Id.* at 776, 782-84, 124 S. Ct. at 2222, 2225-26 (listing Sections 3-14-2, 3-14-3, 3-14-4, 3-14-5, 3-14-7, 3-14-8, 3-14-8(A), and 3-14-8(B)(3) in addition to 3-14-3(B)). Indeed, this Court granted certiorari based on Z.J. Gifts' facial challenge to the judicial review provision. *Id.* at 776, 124 S. Ct. at 2222. As the holding of the Georgia Supreme Court, which is based on federal First Amendment jurisprudence, is contrary to established precedent from this Court, Granite State's petition should be granted.

CONCLUSION

The Georgia Supreme Court's decision to deny Granite State standing to challenge a licensing scheme that restricted First Amendment activity was erroneous. Long-standing precedent from this Court provides that an applicant who is subject to a licensing scheme has standing to challenge it. The fact that a litigant has submitted an application does not somehow deprive that applicant on the ability to challenge the licensing scheme. Likewise, the fact that a municipality denies an application based on certain portions of an ordinance does not mean that the applicant is not "subject to" the licensing scheme. This is particularly true in this instance, where the City of Roswell required that a sign application be submitted before any sign could be displayed.

Refusing to allow an applicant standing to challenge a licensing scheme on behalf of others not before the court will result in unconstitutional prior restraints being left "on the books," thereby threatening the First Amendment rights of countless unknowing applicants. The Georgia Supreme Court's creation of such a reality must be addressed.

Therefore, Granite State respectfully requests that its Petition for Writ of Certiorari be GRANTED.

DATED this 10th day of July, 2008.

Respectfully submitted,

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Supreme Court of Georgia

GRANITE STATE OUTDOOR ADVERTISING, INC.

v.

CITY OF ROSWELL

No. S07A1885.

March 10, 2008.
Reconsideration Denied April 11, 2008.

G. Franklin Lemond, Jr., Matthew Christopher Klase, Edward Adam Webb, Webb Law Group, L.L.C., Atlanta, for Appellant.

Richard A. Carothers, Carothers & Mitchell, LLC, Buford, for Appellee.

BENHAM, Justice.

Granite State Outdoor Advertising, Inc. ("Granite State") is in the business of buying and leasing land for the purpose of erecting signs and billboards displaying both commercial and noncommercial messages. In May and June of 2003, Granite State submitted three applications to the City of Roswell ("City") to construct billboard signs, each 672 square feet in area and 70 feet in height, at different locations within the City. The City rejected each application because the sign ordinance in place at the time limited off-premises signs to a maximum area of 128 square feet and 12 feet in height and because the applications were incomplete. On July

16, 2003, the City enacted a moratorium on the issuance of sign permits effective until September 15, 2003. The purpose of the moratorium was to allow the City time to draft and implement an amended sign ordinance. Granite State alleges it attempted to submit applications for similarly-sized signs during the moratorium and the City did not accept any of its sign applications for processing.

After its applications were rejected by the City, Granite State brought suit, contending that the City's entire sign ordinance, as it existed in April 2003, was unconstitutional. The trial court denied Granite State's motion for partial summary judgment and granted the City's cross-motion for summary judgment. Granite State now alleges several enumerations of error concerning its constitutional challenge to the City's April 2003 sign ordinance.

1. Granite State argues that the trial court erred when, by relying on the decisions of the United States Court of Appeals for the Eleventh Circuit ("Eleventh Circuit") in *Granite State Outdoor Advertising, Inc. v. Clearwater*, 351 F.3d 1112 (11th Cir.2003) and in *KH Outdoor, LLC v. City of Trussville*, 458 F.3d 1261 (11th Cir.2006), it limited the extent of Granite State's standing to challenging, either as applied or facially, only those provisions of the ordinance by which Granite State was injured in fact. Under federal jurisprudence, there are three constitutional requirements for obtaining standing: (1) an injury in fact; (2) a causal connection between the injury and the causal conduct; and (3) the likelihood that the injury will be redressed with a favorable decision. *Bennett v. Spear*, 520 U.S. 154, 162, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997); *Lujan v.*

Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). In addition to the constitutional requirements for standing, there is a subset of "prudential" standing requirements that have been developed by the United States Supreme Court. *Allen v. Wright*, 468 U.S. 737, 750-51, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984). One of these prudential standing requirements is that a party is limited to asserting its own rights and not that of third parties. Id.[1] The federal courts have carved out an exception to this particular prudential standing requirement in free speech cases, adopting what is known as the overbreadth doctrine. *Clearwater*, 351 F.3d at 1116.

The overbreadth doctrine permits the assertion of third-party rights in free speech cases when a statute is applied constitutionally to the party before the court, but may be unconstitutional if applied to any third parties not before the court.[2]

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[1] The other prudential standing requirements, not at issue in this case, call for the plaintiff's complaint (1) to fall "within the zone of interests protected by the statute or constitutional provision at issue" and (2) to exclude "abstract questions amounting to generalized grievances which are more appropriately resolved by the legislative branches." *Bischoff v. Osceola County, Fla.*, 222 F.3d 874, 883 (11th Cir.2000).

[2] In *Virginia v. Hicks*, 539 U.S. 113, 119, 123 S.Ct. 2191, 156 L.Ed.2d 148 (2003), the United States Supreme Court explained its rationale for the overbreadth doctrine as follows:

> We have provided this expansive remedy out of concern that the threat of enforcement of an overbroad law may deter or "chill" constitutionally protected speech-especially when the overbroad statute imposes criminal sanctions. [Cits.] Many persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech,

Id.; *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (93 S.Ct. 2908, 37 L.Ed.2d 830 (1973). The overbreadth doctrine is not an exception to establishing constitutional standing which unequivocally requires an injury in fact. *Virginia v. American Booksellers Assoc., Inc.*, 484 U.S. 383, 392, 108 S.Ct. 636, 98 L.Ed.2d 782 (1988) (to challenge the constitutionality of a statute on overbreadth grounds the plaintiff must "establish at an irreducible minimum an injury in fact"); *Secretary of State of Md. v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 104 S.Ct. 2839, 81 L.Ed.2d 786 (1984) facial challenges to overly broad statutes are permissible if the party asserting the challenge can show an injury in fact). Furthermore, the overbreadth doctrine does not apply to commercial speech, but may only be used as an exception to prudential standing in the context of noncommercial speech.[3] *See Bates v. State Bar of Arizona*, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977); *Clearwater*, 351 F.3d at 1116 (overbreadth doctrine applies to cases concerning noncommercial speech).

In *Clearwater*, the Eleventh Circuit held that Granite State was required to meet the constitutional requirement of standing that it had suffered an injury in fact, before it could use the overbreadth doctrine to assert the rights of third-

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> [Cit.]-harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas. Overbreadth adjudication, by suspending all enforcement of an overinclusive law, reduces these social costs caused by the withholding of protected speech.

[3] Granite State alleges it intended to use its signs to convey both commercial and non-commercial messages.

parties. 351 F.3d at 1116. More specifically, the Eleventh Circuit concluded that Granite State could only challenge the provision under which it was injured, and, per the overbreadth doctrine, as that provision would apply to third parties in the context of noncommercial speech. *Id.* In the instant case, Granite State argues that the Eleventh Circuit's decision in Clearwater and similar decisions are "aberrant" and that it is entitled to facially attack any and all provisions of the City's ordinance that are allegedly unconstitutional. We disagree that Clearwater and its progeny are aberrant. *See CAMP Legal Defense Fund, Inc. v. City of Atlanta*, 451 F.3d 1257 (11th Cir.2006) (organization lacked standing under the overbreadth doctrine to challenge provisions of an ordinance by which its activities were not affected); *Tanner Adver. Group, LLC v. Fayette County*, 451 F.3d 777, 791 (11th Cir.2006) (en banc) (plaintiff who challenged a county sign ordinance after its sign permit was denied lacked standing to challenge the ordinance's "Attention-getting devices" provision because "[t]he record is devoid of any evidence that [the plaintiff] ever intended to use 'Attention-getting devices'....").

We also cannot agree with Granite State's assertions that these federal cases are inconsistent with Georgia jurisprudence. In regard to establishing standing, we have held that "the only prerequisite to attacking the constitutionality of a statute 'is a showing that it is hurtful to the attacker. (Cits).'" *Bo Fancy Productions, Inc. v. Rabun Co. Bd. of Commissioners*, 267 Ga. 341, 344-45, 478 S.E.2d 373 (1996) (concerning constitutionality of a zoning ordinance in the context of "prior restraint"). We have not expressly adopted the federal overbreadth

doctrine as an exception to standing; however, we have articulated a standard of "relaxed" standing in free speech cases, allowing broader challenges to the constitutionality of a statute in such contexts. *Id.*; Fulton *County v. Galberaith*, 282 Ga. 314, 316, 647 S.E.2d 24 (2007) (relaxed standing is used in free speech cases). *See also Feminist Women's Health Center v. Burgess*, 282 Ga. 433, 651 S.E.2d 36 (2007) (physicians who performed abortions could have third-party standing to challenge, on their patients' behalf, the constitutionality of the state's denial of Medicaid reimbursement payments for medically necessary abortions). However, even with this relaxed standard of standing for free speech cases, aggrieved parties must still show harm by the provision(s) being challenged as unconstitutional.

For example, in *Bo Fancy Productions, Inc.*, two Rabun County agencies filed and obtained an injunction banning festival promoters from holding a festival based on the promoters' failure to comply with certain zoning ordinances and the Mass Gathering Act (OCGA § 31-27-1 et seq.). The promoters allowed the festival to go on in spite of the injunction and were later held in contempt. Although they never applied for and were never denied a permit or license for their festival, we nevertheless held that the promoters had standing, under the relaxed standard for free speech cases, to challenge, as an unconstitutional prior restraint, that part of the Mass Gathering Act which required anyone who was holding a mass gathering to apply for a permit. 267 Ga. at 344, 478 S.E.2d 373. We found that the promoters had standing to attack that portion of the statute because they were held in contempt when they "r[a]n afoul" of the court's

enforcement of the statute. *Id.* at 344-45, 478 S.E.2d 373. As such, there was an injury in fact insofar as the promoters were actually penalized for failing to procure the statutorily required permit. Our decision in *Bo Fancy* does not, as Granite State urges, permit a party denied a permit based on the noncompliance with a constitutionally permissible provision[4] to attack other provisions by which it was not injured in any manner whatsoever. *See Feminist Women's Health Center v. Burgess*, 282 Ga. at 435-36, 651 S.E.2d 36 (physicians performing abortions were entitled third-party standing because they had a financial interest in and were injured in fact from the state's denial of Medicaid reimbursements for their patients who received medically necessary abortions).

Similarly, the appellees in *Fulton County v. Galberaith* never attempted to attack a provision by which they were not harmed in fact. Those appellees were prohibited from erecting off-premises advertising signs by a provision that banned all off-premise signs in commercial zones. We found that appellees had "as applied" standing as well as standing to facially attack the ordinance because it effectively found all off-premises signs "presumptively illegal" and, through a regulatory scheme of exceptions to the presumption, prohibited signs based on their content. 282 Ga. at 315-17, 647 S.E.2d 24.[5] Although we articulated a relaxed

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[4] Granite State does not and cannot contend that the City's height and size provisions are unconstitutional. *Clearwater*, 351 F.3d at 1116.

[5] Our review in Galberaith was limited to the constitutionality of the ordinance under the First Amendment of the Constitution of the United States and did not consider the

standard of standing in *Galberaith*, we did not apply relaxed standing in our analysis because the statute was unconstitutional "as applied" to the appellees. Id. at 316, 647 S.E.2d 24. Thus, our decision in that case cannot be extrapolated for the proposition that, in such cases, litigants may make facial attacks upon entire statutory schemes and provisions by which they were not harmed "as applied" or harmed by "running afoul" of the provision.[6] Accordingly, we conclude that the trial court made no error when it held Granite State had standing to contest only those provisions of the sign ordinance that had caused injury to Granite State.

2. Since the denial of Granite State's sign applications for failure to meet the City's height and size restrictions was correct because the restrictions were constitutional (*See* Clearwater, 351 F.3d at 1117) and because Granite State lacked standing to challenge any other provision of the statute, the trial court should not have addressed Granite State's constitutional arguments concerning other provisions of the April 2003 ordinance.[7] Furthermore, because of Granite State's lack of standing, we do not address

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constitutionality of the statute under Georgia's constitution. *Id.* at 315, 647 S.E.2d 24.

[6] Since we did not address the issue of standing in *Union City Bd. of Zoning Appeals v. Justice Outdoor Displays, Inc.*, 266 Ga. 393, 467 S.E.2d 875, it does not constitute binding precedent on that issue. *See Allen v. State*, 219 Ga. 777, 778, 135 S.E.2d 885 (1964).

[7] In its ruling, the trial court determined that the statute was content-neutral and severed the portions which Granite State alleged were unconstitutional.

Granite State's enumerations of error attacking the entire statute on constitutional grounds.[8]

3. Granite State also argues that the City's ordinance violated the First Amendment by failing to require officials to act within a limited period of time. *See Bo Fancy*, 267 Ga. at 344-45, 478 S.E.2d 373 (ordinance that failed to set any time table for issuing license for holding mass gatherings was unconstitutional). This contention is without merit. Section 22.22 of the City's April 2003 sign ordinance provided that the City would process all sign applications within 30 business days of receipt. All applications Granite State submitted during May and June 2003 were acted upon in less than 30 business days of being submitted.[9] As such, Granite State cannot show it was injured by this provision of the ordinance and is without standing to challenge it on constitutional grounds. *Clearwater*, 351 F.3d at 1116.

4. Granite State further contends the trial court erred when it failed to analyze whether the 60-day moratorium was the least restrictive means to meet the City's goal of amending the April 2003 statute. Instead of articulating a detailed analysis

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[8] These enumerations of error concern the content-neutrality of the statute, the applicability of the "least restrictive means" test, the applicability of the test enunciated in *Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York*, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 for commercial speech, and the trial court's severance of allegedly unconstitutional provisions.

[9] Consequently, the trial court's observation that mandamus would be available to remedy any failure by the City to abide by the time table set forth in the ordinance for processing applications has no bearing on the factual circumstances of this case.

in its ruling, the trial court assumed the moratorium was invalid. The trial court then found that even if the moratorium was invalid and the City was compelled to process applications during the time period in question, Granite State's applications filed during that time were properly denied because they failed to comply with the size and height requirements of the April 2003 statute. Assuming, without deciding, the validity of the trial court's premise that the moratorium was invalid, there was no error in the trial court's analysis or ruling.

5. Finally, Granite State contends it is entitled to damages pursuant to 42 U.S.C. § 1983. Relief under that provision is for the purpose of compensating those who have been harmed by the deprivation of their constitutional rights. *Carey v. Piphus*, 435 U.S. 247, 254, 98 S.Ct. 1042, 55 L.Ed.2d 252 (1978); *Tanner Advertising Group, LLC v. Fayette County*, 451 F.3d at 786. Because Granite State has not been deprived of any constitutional right, it is not entitled to any damages, nominal or otherwise. *SMD, LLP v. City of Roswell*, 252 Ga.App. 438, 442, 555 S.E.2d 813 (2001) (party not entitled damages where it did not suffer a "total deprivation" of its constitutional rights). Accordingly, the trial court did not err when it granted summary judgment to the City. Judgment affirmed in part and vacated in part.

All the Justices concur. MELTON, Justice, concurring.

Although I concur in the judgment of the majority, I write separately to correct some confusion caused by our decision in *Fulton County v.*

Galberaith, 282 Ga. 314, 647 S.E.2d 24 (2007). In that case, as pointed out by the majority, the appellees were allowed to raise an "as applied" and facial constitutional attack against provisions of a sign ordinance which directly harmed them. In discussing the appellees' standing to bring these claims, however, our citations to authority were imprecise. Specifically, we cited to *Union City Bd. of Zoning Appeals v. Justice Outdoor Displays*, 266 Ga. 393, 467 S.E.2d 875 (1996), and, in a parenthetical, characterized this case as "affirming a superior court's finding of unconstitutionality of various provisions of a local sign code which were not directly implicated in the underlying appeal from denial of application of variance." This description of Union City, because it was incorporated in our discussion of standing, gave the erroneous implication that standing to bring "as applied" and facial attacks to sign ordinances would be extended to various provisions of a sign ordinance not implicated by the harm suffered by the challenger. That simply is not the case, as shown by the majority opinion in this case, and it was not our intent to imply in Galberaith otherwise.

IN THE SUPERIOR COURT OF FULTON COUNTY

STATE OF GEORGIA

GRANITE STATE OUTDOOR ADVERTISING, INC.,	)	
PLAINTIFF,	)	
	)	CIVIL ACTION
	)	FILE NO.
v.	)	2004-SC-82840
CITY OF ROSWELL, GEORGIA, AND JERE WOOD,	)	
DEFENDANTS.	)	

TRANSCRIPT OF ORAL RULING BEFORE THE HONORABLE CONSTANCE C. RUSSELL

ATLANTA JUDICIAL CIRCUIT
APRIL 12, 2007

APPEARANCES:

FOR THE PLAINTIFF: E. ADAM WEBB, ESQ., THE WEBB LAW GROUP, L.L.C.,

FOR THE DEFENDANT: RICHARD A. CAROTHERS, ESQ., CAROTHERS & MITCHELL, L.L.C.,

EVELYN PATTERSON, CCR-B-1977
OFFICIAL COURT REPORTER
FULTON COUNTY SUPERIOR COURT

T-5705 JUSTICE CENTER TOWER
ATLANTA, GEORGIA 30303

PROCEEDINGS

APRIL 12, 2007

THE COURT: THIS IS IN THE MATTER OF GRANITE STATE OUTDOOR ADVERTISING, INCORPORATED, PLAINTIFF, V. THE CITY OF ROSWELL AND JERE WOOD. THIS IS AN ORAL RULING ON CROSS MOTIONS FOR SUMMARY JUDGMENT. THE PLAINTIFF'S MOTION BEING A PARTIAL MOTION FOR SUMMARY JUDGMENT ADDRESSED TO ALL OF THE CLAIMS SUBSTANTIVELY, BUT NONE ADDRESSING ISSUES OF DAMAGES AND FEES. AND THE DEFENDANT'S MOTION BEING A MOTION FOR SUMMARY JUDGMENT AS TO ALL ISSUES.

WITH REGARD TO THIS MATTER, THE COURT FINDS AS FOLLOWS: PLAINTIFF, GRANITE STATE OUTDOOR ADVERTISING, INCORPORATED, IS A COMPANY WHICH ACQUIRES THE RIGHT TO PLACE SIGNS ON VARIOUS PROPERTIES AND TO LEASE ACCESS TO THOSE SIGNS. IT IS BASICALLY A BILLBOARD ENTITY. IT BUYS AND LEASES LAND FOR SIGN CONSTRUCTION THAT DISSEMINATES BOTH COMMERCIAL AND NONCOMMERCIAL SPEECH.

THE CITY OF ROSWELL IS A MUNICIPALITY IN THE STATE OF GEORGIA, AND THE CITY HAS A SIGN ORDINANCE WHICH REGULATES SUCH ACTIVITIES. JERE

WOOD, THE DEFENDANT IN THIS MATTER, IS THE MAYOR OF THE CITY OF ROSWELL.

THE MOTION FOR SUMMARY JUDGMENT FILED BY GRANITE STATE OUTDOOR ADVERTISING SPECIFICALLY ADDRESSES THE CONSTITUTIONALITY OF THE CITY'S SIGN ORDINANCE. INSOFAR AS IT EXISTED AT THE TIME THAT IT FILED VARIOUS APPLICATIONS FOR SIGNS, THE SIGN ORDINANCE THAT WAS IN PLACE AT THE TIME THAT GRANITE FILED ITS VARIOUS APPLICATIONS WAS THE SIGN ORDINANCE WHICH WAS ADOPTED IN APRIL OF 2003. SUBSEQUENT TO ADOPTION OF THAT ORDINANCE, THE CITY AT ONE POINT INSTITUTED A MORATORIUM ON APPLICATIONS FOR PERMITS. IT ALSO, AFTER THIS LITIGATION WAS FILED, AMENDED THE SIGN ORDINANCE. THE AMENDMENTS WERE SUBMITTED TO THIS COURT AS PART OF THE AMENDED ANSWER FILED ON BEHALF OF THE CITY OF ROSWELL AND MAYOR WOOD. IT IS THAT FRAMEWORK WHICH FORMS THE COURT'S DECISION IN THIS MATTER.

THE FIRST ISSUE IS WHETHER OR NOT THE ISSUES RAISED BY GRANITE STATE ARE IN FACT MOOT AS A CONSEQUENCE OF THE CITY'S AMENDMENT OF THE APRIL, 2003, ORDINANCE. AND IN THAT REGARD, THE COURT FINDS THAT WHILE THERE IS AUTHORITY RELATED TO THESE MATTERS WHICH WOULD SUGGEST THAT WHEN AN ISSUE OF CONSTITUTIONALITY IS RAISED AND THE OFFENDING PROVISIONS ARE AMENDED, THAT MAKES THE ISSUE MOOT. IN GEORGIA SPECIFICALLY, THERE APPEARS TO BE A

PROVISION ADDRESSED TO THE NOTION THAT ONCE AN APPLICATION HAS IN FACT BEEN FILED, THE PARTY APPLYING IS ENTITLED TO HAVE THE APPLICATION CONSIDERED UNDER THE STATUTORY SCHEME AS IT WAS AT THE TIME THAT THE APPLICATION WAS FILED.

INSOFAR AS THIS COURT IS BOUND BY GEORGIA LAW, I FIND THAT THE CASE OF *RECYCLE & RECOVER, INCORPORATED, V. GEORGIA BOARD OF NATURAL RESOURCES* IS CONTROLLING PRECEDENT. THAT'S AT 266 GA. 253, A 1996 DECISION. IN THAT GRANITE STATE HAS A RIGHT TO HAVE ITS APPLICATION CONSIDERED UNDER THE LAW AT THE TIME OF THE APPLICATION; AND THUS THE CURRENT CHALLENGE WILL BE REVIEWED BASED UPON THE APRIL, 2003, ORDINANCE AS OPPOSED TO THE AMENDMENTS.

THE NEXT ISSUE THAT ARISES IS THE EXTENT OF GRANITE STATE'S STANDING TO CHALLENGE THE PROVISIONS OF THE APRIL, 2003, ORDINANCE. GRANITE STATE SUBMITTED SIGNED APPLICATIONS TO THE CITY OF ROSWELL, ALL OF WHICH WERE DENIED. IT SEEKS TO CHALLENGE THE CITY'S SIGN ORDINANCE BOTH FACIALLY IN ITS ENTIRELY AND AS APPLIED. THE CITY HAS CHALLENGED GRANITE'S STANDING TO ATTACK THE ORDINANCE IN ITS ENTIRETY AND INSTEAD ASSERTS THAT PLAINTIFF'S STANDING IS LIMITED TO THOSE PORTIONS OF THE ORDINANCE BY WHICH IT WAS AFFECTED.

STANDING, AS A GENERAL

PROPOSITION, REQUIRES A SHOWING OF AN INJURY IN FACT. IN THE FIRST AMENDMENT CONTEXT, THE OVERBREADTH DOCTRINE IS AN EXCEPTION TO THE PRUDENTIAL STANDING PRINCIPLE THAT ONE GENERALLY MUST RAISE ITS OWN RIGHTS AND CANNOT RAISE THE RIGHTS OF THIRD PARTIES NOT BEFORE THE COURT. HAVING LOOKED AT THE AUTHORITIES AS TO THIS MATTER, THE OVERBREADTH EXCEPTION DOES NOT, HOWEVER, ELIMINATE THE INJURY IN FACT REQUIREMENT AS TO STANDING. A PLAINTIFF MAY BRING AN OVERBREADTH CHALLENGE TO THOSE PROVISIONS OF LAW OR ORDINANCE THAT AFFECTS ITS ACTIVITIES. THE OVERBREADTH DOCTRINE DOES NOT CHANGE THE STATUTES OR PROVISIONS OF THE ORDINANCE THE PLAINTIFF MAY CHALLENGE. HE CAN ONLY CONTEST THOSE WHICH ACTUALLY CAUSED HIM INJURY. THE OVERBREADTH DOCTRINE SIMPLY ALLOWS A PLAINTIFF TO BRING A FACIAL CHALLENGE TO A PROVISION OF LAW THAT CAUSES INJURY, REGARDLESS OF WHETHER THE PROVISION'S REGULATION OF HIS CONDUCT IN PARTICULAR WAS CONSTITUTIONAL. WHAT THAT ULTIMATELY LEADS TO IS, IN THIS COURT'S VIEW, A CHALLENGE IS NOT LIMITED TO THE SPECIFIC CONDUCT ASSERTED BY THE CHALLENGING PARTY. THEY MAY BRING A BROADER CLAIM. THAT DOES NOT, HOWEVER, MEAN THAT THEY MAY CHERRY PICK A COMPREHENSIVE ORDINANCE IN ORDER TO FIND THOSE PROVISIONS WHICH MAY

THEORETICALLY GIVE RISE TO A CONSTITUTIONAL CHALLENGE. AND IN THIS REGARD, I HAVE LOOKED AT SPECIFICALLY, AND BEEN INFLUENCED IN ARRIVING AT THIS CONCLUSION, *K.H. OUTDOOR, L.L.C., V. THE CITY OF TRUSSVILLE*, WHICH IS AT 458 F.3D 1261 AND *GRANITE STATE OUTDOOR ADVERTISING, INCORPORATED, V. THE CITY OF CLEARWATER, FLORIDA*, AT 351 F.3D 1112. I SPECIFICALLY FIND THAT THOSE CASES ARE NEITHER INCONSISTENT NOR CONTRADICTED BY GEORGIA LAW. THE CASES THAT HAVE BEEN CITED TO THIS COURT, IN PARTICULAR *BO FANCY PRODUCTIONS, INCORPORATED, V. RABUN COUNTY BOARD OF COMMISSIONERS*, WHICH IS 267 GA. 341, A 1996 DECISION, AND *UNION CITY BOARD OF ZONING APPEALS V. JUSTICE OUTDOOR DISPLAYS, INCORPORATED*, AT 266 GA. 393, A 1996 DECISION, WHILE THEY DISCUSS STANDING, IN *BO FANCY*, THE COURT SAID THAT THE ONLY PREREQUISITE IS TO ATTACKING THE CONSTITUTIONALITY OF A STATUTE IS A SHOWING THAT IT IS HURTFUL TO THE ATTACKER. IT IS THAT LANGUAGE WHICH SUGGESTS THAT UNDER GEORGIA LAW THE NOTION OF INJURY IS NOT ABANDONED IN THE CONTEXT OF DETERMINING THE ISSUE OF STANDING. AND IN THAT CASE, WHERE THE APPEALING PARTY DID NOT IN FACT SEEK A PERMIT, THE COURT RECOGNIZED THAT ALTHOUGH NO PERMIT HAD BEEN APPLIED FOR, THE APPELLANT'S ACTION FELL WITHIN ITS AMBIT IN THE SENSE THAT THE STATUTE WAS NOT OF MERE ACADEMIC

INTEREST. AND THAT IS CONSISTENT WITH THE NOTION THAT THERE HAS TO BE SOME ATTACHMENT RELATED TO THIS DEFENDANT AS OPPOSED TO A SPECULATIVE, FOR THE LACK OF A BETTER TERM, EFFORT TO FIND SOMETHING TO CREATE A CONSTITUTIONAL CHALLENGE. AND WITH RESPECT TO *UNION CITY BOARD OF ZONING APPEALS V. JUSTICE OUTDOOR DISPLAYS, INCORPORATED*, IN THAT CASE, THE COURT ADDRESSED A BROAD-BASED CHALLENGE AND LOOKED AT ALL THE ISSUES THAT WERE RAISED. HOWEVER, THERE IS NO INDICATION IN THE CASE THAT THE SPECIFIC STANDING ARGUMENT, WHICH HAS BEEN MADE TO THIS COURT, WAS EVER RAISED. IN SUM, IT APPEARS THAT THE ISSUE OF STANDING AS IT HAS BEEN FRAMED BEFORE THIS COURT SIMPLY HAS NOT REACHED THE LEVEL WHERE IT GOT ADDRESSED ANYWHERE. AND IN THIS COURT'S JUDGMENT, THE PROPER BALANCE IS STRUCK BY LOOKING TO FEDERAL AUTHORITIES WHICH THE COURTS OF THIS STATE HAVE LOOKED TO IN THIS CONTEXT ROUTINELY. AND SO IN ANALYZING THE ISSUE OF STANDING IN THIS MATTER, THE COURT FINDS THAT GRANITE STATE'S STANDING IS LIMITED TO CHALLENGING THOSE PROVISIONS OF THE SIGN ORDINANCE BY WHICH IT WAS AFFECTED.

AND IN THAT REGARD, INSOFAR AS GRANITE STATE WAS SEEKING TO CREATE PERMANENT SIGNS, IT WOULD HAVE BEEN AFFECTED BY THOSE PROVISIONS RELATING TO THE PURPOSE AND FINDINGS OF THE

STATUTES, ITS DEFINITIONS, ITS PERMIT EQUIREMENTS, ITS HEIGHT AND MAXIMUM SIZE RESTRICTIONS. AND SO TO THE EXTENT WE DISCUSSED THE ISSUE OF STANDING, IT IS DISCUSSED BROADLY. IT IS NOT LIMITED TO THE SPECIFIC PROVISION THAT WAS SPECIFICALLY ADDRESSED.

RATHER, IT IS ADDRESSED TO THE REALITY OF THOSE PORTIONS OF THIS STATUTE WHICH AFFECTS GRANITE'S INTEREST IN PURSUING ITS BUSINESS OBJECTIVES.

THE NEXT ISSUE PRESENTED IN ATTEMPTING TO RESOLVE THIS MATTER IS WHETHER OR NOT THE ORDINANCE WHICH IS AT ISSUE IS CONTENT NEUTRAL. BECAUSE WHETHER OR NOT IT IS CONTENT NEUTRAL AFFECTS THE MANNER IN WHICH IT IS TO BE EVALUATED BY THIS COURT. AND IN THAT REGARD, THE COURT FINDS THAT THE ISSUE OF CONTENT NEUTRALITY AS SET FORTH IN GEORGIA LAW IS RELATED TO THE INTENT OF THE GOVERNING BODY. PRINCIPLE INQUIRY IN DETERMINING WHETHER A LEGISLATIVE ACT IS CONTENT NEUTRAL IS WHETHER THE GOVERNMENT HAS ADOPTED A REGULATION OF SPEECH BECAUSE OF A DISAGREEMENT WITH THE MESSAGE IT CONVEYS. THE GOVERNMENT'S PURPOSE IS THE CONTROL AND CONSIDERATION. A REGULATION THAT SERVES PURPOSES UNRELATED TO THE CONTENT OF EXPRESSION IS DEEMED NEUTRAL, EVEN IF IT HAS INCIDENTAL AFFECT ON SOME SPEAKER'S MESSAGES BUT NOT OTHERS.

WITH RESPECT TO THE ROSWELL ORDINANCE, IT WAS ENACTED FOR NUMBER OF PURPOSES, INCLUDING AESTHETICS AND TRAFFIC SAFETY. IT PROVIDES A LIST OF ITS PURPOSES AND FINDINGS. IT WAS ADOPTED IN FURTHERANCE OF THE OBJECTIVES OF THE CITY'S COMPREHENSIVE PLAN TO PROTECT THE UNRESTRICTED PROLIFERATION OF SIGNS, TO REDUCE TRAFFIC AND PEDESTRIAN HAZARDS, TO AVOID THE HARMFUL ASPECTS OF THE UNRESTRICTED PROLIFERATION OF SIGNS IDENTIFIED BY THE CITY'S PLANNING DIRECTOR IN HIS POSITION TO PROMOTE ECONOMIC DEVELOPMENT AND ENSURE FAIR AND CONSISTENT ENFORCEMENT OF SIGN REGULATIONS. IN SUM, THE PURPORTED PURPOSES OF THE CITY'S SIGN ORDINANCES DO NOT INDICATE THAT IT WAS IN ANY WAY INTENDED TO BE OTHER THAN CONTENT NEUTRAL. AND IT IS FROM THAT FOUNDATION THAT THE COURT'S RULING ISSUES.

THE GRAVAMEN OF GRANITE STATE'S OBJECTIONS TO THE APRIL, 2003, VERSION OF THE ORDINANCE IS IF YOU LOOK AT VARIOUS PROVISIONS OF IT, THEY ARE IN FACT AFFECTED BY CONTENT OF THE STATUTE. THE FACT IS THAT THE APPLICATIONS WHICH GRANITE IN FACT PRESENTED TO THE STATE DID NOT COMPLY WITH THE SIGN ORDINANCE. THEY SOUGHT TO CREATE AND TO ESTABLISH SIGNS WHICH WERE LARGER THAN THE LIMITATIONS SET BY THE SIGN ORDINANCE. AND SO FOR PURPOSES OF THIS

COURT'S ANALYSIS, IF THE COURT ASSUMES THAT EACH AND EVERY CONSTITUTIONAL CHALLENGE RAISED BY GRANITE STATE GIVE OR TAKE AND THEN RELIES UPON THE ISSUES RELATED TO SEVERING THOSE PROVISIONS, WHICH MAY BE OBJECTIONABLE, ONE THEN GETS TO ANALYZE THE STATUTE. IT IS -- IF YOU LOOK AT SECTION 22, ITS PURPOSE AND FINDINGS, ARE NOT UNCONSTITUTIONAL. INSOFAR AS ITS DEFINITIONS ARE A NECESSARY ELEMENT, IF ONE EXCLUDES THOSE DEFINITIONS WHICH ARE RELATED TO CONTENT, THAT STILL DOES NOT MEAN THAT GRANITE STATE PREVAILS ON ITS CLAIMS.

IF ONE LOOKS AT THE PERMITS REQUIREMENTS, ASSUMING EVERYTHING WHICH MIGHT BE RELATED TO ANY OBJECTIONABLE CONTENT IS EXCLUDED, EVEN ONE THAT IS SIMPLY LEFT WITH THAT A PERMIT IS REQUIRED, THAT DOES NOT IN ANY WAY RENDER THIS STATUTE UNCONSTITUTIONAL.

IF ONE REMOVES EVERYTHING ASSOCIATED WITH DRAWING A DISTINCTION BETWEEN COMMERCIAL AND NONCOMMERCIAL SIGNS, IF EVERYTHING ASSOCIATED WITH TEMPORARY SIGNS IS REMOVED, IF THERE ARE NO PROVISIONS AUTHORIZING EXEMPTIONS, IF ONE IS LEFT WITH SOLELY AN APPROPRIATE DEFINITION OF PURPOSES, A REGULATION OF SIGNS BY REQUIRING A PERMIT, A HEIGHT RESTRICTION AND A SIZE RESTRICTION, ALL OF WHICH PASS CONSTITUTIONAL MUSTER BECAUSE THEY ARE A NUMBER AND A SIZE.

ASSUMING EVERYTHING ASSOCIATED WITH TYPE OF SIGN, LANGUAGE ON THE SIGN, IF ALL OF THAT IS REMOVED, ONE THEN IS LEFT WITH PURPOSE AND FINDINGS, A PERMIT REQUIREMENT, SIZE LIMITATIONS. AND IF ONE THEN GOES TO THE ISSUANCE OF PERMITS, WHICH IS SECTION 22.22, WHAT IT SPECIFICALLY STATES IS SECTION 22.22, ISSUANCE OF PERMITS, THE CITY SHALL PROCESS ALL SIGN PERMIT APPLICATIONS WITHIN 30 BUSINESS DAYS OF THE CITY'S ACTUAL RECEIPT OF AN APPLICATION AND A SIGNED PERMIT FEE. THE ZONING DIRECTOR SHALL GIVE NOTICE TO THE APPLICANT OF HIS DECISION BY HAND DELIVERY OR BY MAILING A NOTICE BY CERTIFIED MAIL.

INSOFAR AS THE CITY SHALL PROCESS ALL SIGN PERMIT APPLICATIONS WITHIN 30 DAYS OF THE CITY'S ACTUAL RECEIPT OF AN APPLICATION AND THE ZONING DIRECTOR SHALL GIVE NOTICE TO THE APPLICANT OF HIS DECISION, MEANING THAT LANGUAGE, THE CITY'S OBLIGATED TO PROCESS THE SIGN -- PROCESS THE PERMIT AND EITHER ACCEPT IT OR REJECT IT WITHIN 30 DAYS, PERIOD. IF THEY FAIL TO DO SO, THE REMEDY IS A PETITION FOR MANDAMUS, WHICH COMPELS MUNICIPALITIES TO DO THAT WHICH THEY ARE LEGALLY OBLIGATED TO DO. AND A FAILURE TO COMPLY, THE REMEDY IS A PETITION FOR MANDAMUS WHICH COMPELS A DECISION WITHIN THE TIME LIMIT WHICH THIS ORDINANCE REQUIRES.

THE ISSUE WHICH HAS BEEN RAISED HERE IS THE CITY'S CREATION OF A

MORATORIUM AND A REFUSAL TO ACCEPT APPLICATIONS. INSOFAR AS A MORATORIUM WAS CREATED AND THERE WAS A REFUSAL TO ACCEPT APPLICATIONS PURPORTEDLY AND APPLICATIONS WERE IN FACT MADE, ASSUMING THE MORATORIUM WAS IMPROPER, INVALID, AND UNCONSTITUTIONAL, THE REMEDY WAS TO COME TO THIS COURT AND TO COMPEL ACCEPTANCE OF APPLICATIONS. EVEN IF ONE ASSUMES THAT THE MORATORIUM WAS INVALID, UNCONSTITUTIONAL, AND SHOULD NOT HAVE BEEN APPLIED, THE APRIL, 2003, SIGN ORDINANCE WOULD THEN HAVE BEEN IN EXISTENCE AND IN EFFECT; AND SO A REMOVAL OF THE IMPROPER MORATORIUM WOULD HAVE RESULTED IN THE CITY OF ROSWELL BEING COMPELLED TO ACCEPT APPLICATIONS AND TO PROCESS THEM WITHIN 30 DAYS AND TO GRANT THEM IF THEY COMPLIED WITH THOSE PORTIONS OF THE SIGN ORDINANCE WHICH WERE NOT CONSTITUTIONALLY INFIRMED.

ULTIMATELY, ASSUMING EVERY ARGUMENT THAT GRANITE MAKES, ITS APPLICATION DID NOT COMPLY WITH THE SIGN ORDINANCE FOR ENTIRELY CONTENT NEUTRAL REASONS BECAUSE IT WAS LARGER THAN THE CITY ORDINANCE ESTABLISHED. AND IF EVERY ELEMENT OF THE ORDINANCE WERE THROWN OUT OTHER THAN YOU HAVE TO HAVE A PERMIT, THE SIGNS HAVE TO COMPLY WITH A PARTICULAR SIZE AND HEIGHT REGARDLESS OF CONTENT, THIS APPLICATION WOULD HAVE BEEN PROPERLY

DENIED.

AND FOR THOSE REASONS, WHAT THIS COURT FINDS IS THAT THE MOTION FOR SUMMARY JUDGMENT WITH RESPECT TO GRANITE STATE ADVERTISING, INCORPORATED, IS DENIED.

WITH RESPECT TO THE CITY OF ROSWELL, INSOFAR AS THE APRIL, 2003, ORDINANCE HAS PROVISIONS WHICH DO NOT PASS CONSTITUTIONAL MUSTER, THEY ARE APPROPRIATELY SEVERED AND STRUCK.

THE REMAINING PROVISIONS ARE ENFORCEABLE. GRANITE STATE WOULD NOT HAVE BEEN ENTITLED TO ISSUANCE OF A PERMIT INSOFAR AS ITS APPLICATION, AS THE CITY INDICATED WHEN IT DENIED THE APPLICATIONS, DID NOT COMPLY WITH THE SIZE AND HEIGHT REQUIREMENTS OF THE SIGN ORDINANCE.

WITH RESPECT TO MAYOR WOOD, THE MOTION FOR SUMMARY JUDGMENT AS TO MAYOR WOOD IN PARTICULAR IS GRANTED. WHILE HIS HISTORY, AS THE RECORD REFLECTS, IS PROBLEMATIC, THERE IS NO INDICATION THAT WITH RESPECT TO THIS CLAIM, HE ENGAGED IN CONDUCT WHICH WOULD AUTHORIZE HIS LIABILITY.

AND SO FOR THE REASON STATED, THE CITY OF ROSWELL, GEORGIA'S MOTION FOR SUMMARY JUDGMENT IS GRANTED.

THE MOTION OF GRANITE STATE INSOFAR AS IT SEEKS TO COMPEL THE CITY TO ALLOW THE CONSTRUCTION OF SIGNS OF THE SIZE INDICATED IN ITS APPLICATIONS, IT IS DENIED. INSOFAR AS IT SUGGESTS

PROVISIONS OF THE APRIL, 2003, ORDINANCE WHICH HAVE NOT ALREADY BEEN STRUCK SHOULD SOMEHOW BE DETERMINED TO BE UNCONSTITUTIONAL, THE COURT WILL GRANT ITS CONTENTIONS FOR PURPOSES OF THIS PETITION.

AND THAT CONCLUDES THE RULING AS TO THIS MATTER. GRANITE STATE IS NOT ENTITLED TO EITHER PERMANENT INJUNCTION OR MANDAMUS.

WE WILL BE IN RECESS.

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(3)

No. 08-50

Supreme Court, U.S.
FILED
AUG 8 - 2008
OFFICE OF THE CLERK

In The

Supreme Court of the United States

GRANITE STATE OUTDOOR ADVERTISING, INC.,

Petitioner,

v.

CITY OF ROSWELL, GEORGIA,

Respondent.

On Petition For Writ Of Certiorari To The Georgia Supreme Court

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED BY PETITIONER

Whether an individual who submits an application to engage in a First Amendment protected activity may challenge the licensing scheme as an invalid prior restraint if the application in question is denied based on unrelated grounds.

CORPORATE DISCLOSURE STATEMENT

The City of Roswell is a municipal corporation of the State of Georgia.

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I. RESPONDENT'S STATEMENT OF THE CASE

This matter arose out of the denial of several applications for permits to construct billboard signs made by Petitioner, Granite State Outdoor Advertising, Inc. ("Granite State") to Respondent, the City of Roswell, Georgia ("City"). The applications specified that each sign was to be 672 square feet in size and 70 feet in height, and to be placed at six different locations within the City. The first application for one sign was received on May 7, 2003. A letter rejecting that application was sent on May 13, 2003. The second application was received on June 2, 2003, and rejected on June 6, 2003. The third was made on June 12, 2003 and rejected on June 19, 2003. Each of the applications was rejected solely on the basis that the proposed signs exceeded the maximum allowable height and size under the portion of the City Zoning Ordinance pertaining to signage. On July 16, 2003, the City enacted a moratorium on the issuance of sign permits, which was in effect until September 15, 2004, when the sign ordinance was amended and the moratorium lifted. Petitioner claims it attempted to apply for three signs during the moratorium, but these were not accepted for processing.

Significantly, and contrary to the assertions made by Granite State in its Petition, Section 22.22 of the City sign ordinance in effect at the time of Petitioner's applications required the City to process all sign applications within 30 business days of receipt. This provision was completely complied with as set forth above.

Petitioner filed suit on May 21, 2003 after the rejection of the first application.[1] That suit was dismissed on January 16, 2004 after Petitioner's counsel failed to appear for a court-mandated conference. This matter was filed on March 5, 2004. Following discovery and depositions of the various representatives of the parties, Petitioner filed a Motion for Partial Summary Judgment on or about July 4, 2004. Respondent filed its Cross Motion for Summary Judgment on August 3, 2004.

Following oral argument, the Honorable Constance C. Russell of the Superior Court of Fulton County held a hearing on April 12, 2007, at which she issued an "Oral Ruling" from the bench, granting summary judgment to the Respondent. On May 14, 2007, Petitioner applied for leave to appeal, which was granted by the Supreme Court of Georgia on June 18, 2007.

On March 10, 2008, following oral argument, the Supreme Court of Georgia issued an Order affirming the lower court's opinion in part and vacating in part, but finding completely in favor of Respondent. The Court determined first that, consistent with both federal and Georgia State law, without having suffered

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[1] The Court may note that the case was filed against the City of Roswell and Jere Wood, its Mayor. The Georgia Supreme Court styled its opinion listing only Defendant/Appellee City of Roswell, and Petitioner has used that style in its Petition to this Court. Accordingly, we have used the singular form of Respondent in this response.

any injury in fact, Petitioner had no standing to bring the action challenging portions of the City Ordinance not applied to it. (Petition at 8a.). The Court also determined that because Petitioner lacked standing, it would not consider the remainder of Petitioner's constitutional challenges to the ordinance. (Petition at 8a-9a). The Court further determined that Petitioner's argument that the ordinance was unconstitutional because it allegedly failed to require City officials to act within a specified period of time was without merit because the ordinance specifically contained such a provision. (Petition at 9a). Moreover, the Court rejected Petitioner's argument that the lower Court erred when it failed to consider whether the moratorium imposed by the City was the least restrictive means because even if the moratorium had been invalid, the applications were properly denied. (Petition at 9a-10a). Finally, the Court determined that Granite State was not entitled to damages pursuant to 42 U.S.C. § 1983. (Petition at 10a).

On April 11, 2008, the Supreme Court of Georgia denied Petitioner's Motion for Reconsideration without further opinion. Petitioner has now filed the instant Petition for Writ of Certiorari to the Supreme Court of the United States.

In its underlying decision, the Supreme Court of Georgia followed and adopted the holding of the Eleventh Circuit Court of Appeals in *Granite State Outdoor Advertising, Inc. v. City of Clearwater, Fla.*, 351 F.3d 1112 (11th Cir. Fla., 2003). It is significant to note that as the name of the party implies, the Petitioner in the instant case was also the plaintiff in the

Clearwater action. Throughout its Petition, Granite State refers to that case as well as other Eleventh Circuit caselaw holding contrary to its arguments as "aberrant" and contrary to this Court's decisions. However, it should be noted that the very same argument that Granite State should be granted overbreadth standing to challenge portions of the Roswell City Ordinance not applied to it has already been denied Certiorari by this Court four years ago in *Granite State Outdoor Advertising, Inc. v. City of Clearwater, Fla.*, 543 U.S. 813, 125 S.Ct. 48 (2004).

In the instant petition, Granite State's argument is only slightly different. Rather than restate its previously unsuccessful argument based on overbreadth alone, Granite State now claims that the City sign ordinance operated as a prior restraint on speech and for that reason, it should be granted relaxed standing to facially challenge the ordinance. The fatal defect with this argument, as set forth below, is that this Court's standing jurisprudence still requires that even under the prior restraint analysis, Petitioner must have suffered an injury in fact as a result of the challenged provision of the ordinance. Granite State also included this argument in its previous unsuccessful Petition for Certiorari in *Clearwater*.

Regardless of the method by which it is advancing its argument, the goal of Petitioner and its counsel is the same here as it was with all of the lower courts. They are asking this Honorable Court to overturn the previous decisions and apply overbreadth standing to facially challenge portions of a

local ordinance not applied to it, where there is a total absence of any actual injury. There is simply no precedent in either federal or Georgia law for doing so. If this Court rules as Petitioner requests, billboard companies will attempt to exploit the slightest constitutional weakness in municipal and county ordinances regardless of whether the challenged provision was applied to them or caused them any actual injury. This completely contravenes the jurisprudential requirements for standing found in both federal and Georgia law.

II. REASONS FOR DENYING THE PETITION

Petitioner argues that the Supreme Court of Georgia's decision in the underlying case conflicts with the decisions of this Court. U.S. S.Ct. Rule 10(c). However, it becomes clear based on a more thorough reading of the caselaw cited by Petitioner, that this is simply not the case. To the contrary, the Supreme Court of Georgia properly applied both Georgia and federal authority in determining that an injury in fact is required for Petitioner to have any standing whatsoever. This is regardless of whether the grounds for their argument is a prior restraint on First Amendment activity or any other basis on which any form of relaxed standing such as the overbreadth doctrine could be applied.

III. THE SUPREME COURT OF GEORGIA'S DECISION IS NOT CONTRARY TO THIS COURT'S JURISPRUDENCE REGARDING STANDING, EVEN WHERE FIRST AMENDMENT ACTIVITY IS INVOLVED.

Even under a prior restraint argument, Petitioner must have standing to challenge the provisions of the Ordinance complained of. Under the caselaw previously promulgated by this Court, there are three constitutional requirements for standing: In *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S.Ct. 2130 (1992), this Court held:

> Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an "injury in fact" – an invasion of a legally protected interest which is (a) concrete and particularized [citations omitted] and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" [citations omitted] Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before this court." [citation omitted] Third, it must be "likely," as opposed to merely "speculative" that the injury will be "redressed by a favorable decision." [citation omitted]

Id. at 560-61 (emphasis supplied).

This Court has also developed a series of "prudential" standing requirements. One of these is that a party is limited to asserting its own rights and not that of third parties. *Allen v. Wright*, 468 U.S. 737, 750-51, 104 S.Ct. 3315 (1984). However, this Court and other federal courts have created an exception to this particular prudential standing requirement in free speech cases, known as the overbreadth doctrine.

The leading case on the overbreadth doctrine is *Broadrick v. Oklahoma*, 413 U.S. 601, 93 S.Ct. 2908 (1973). Under this doctrine, a party in a free speech case may have standing to assert the rights of third parties when a statute is applied constitutionally to the party before the court, but might be unconstitutional as applied to someone else. *Id.*

This Court has explained its rationale behind the overbreadth doctrine as follows:

> We have provided this expansive remedy out of concern that the threat of enforcement of an overbroad law may deter or "chill" constitutionally protected speech-especially when the overbroad statute imposes criminal sanctions. Many persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech, harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas. Overbreadth adjudication, by

> suspending all enforcement of an overinclusive law, reduces these social costs caused by the withholding of protected speech.

Virginia v. Hicks, 539 U.S. 113, 119, 123 S.Ct. 2191 (2003). (citations omitted)

However, at the same time, the *Broadrick* Court cautioned:

> Application of the overbreadth doctrine in this manner is, manifestly, strong medicine. It has been employed by the Court sparingly and only as a last resort. Facial overbreadth has not been invoked when a limiting construction has been or could be placed on the challenged statute.

Broadrick, *supra* at 613.

"To bring a cause of action in federal court requires that plaintiffs establish at an irreducible minimum an injury in fact; that is, there must be some 'threatened or actual injury resulting from the putatively illegal action. . . . '" *Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383, 392, 108 S.Ct. 636 (1988). (citations omitted) "Even if an injury in fact is demonstrated, the usual rule is that a party may assert only a violation of its own rights. However, in the First Amendment context, '[l]itigants . . . are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected

speech or expression.'" *Secretary of State of Md. v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 104 S.Ct. 2839 (1984), citing *Warth v. Seldin*, 422 U.S. 490, 499, 95 S.Ct. 2197, 2205 (1975).

Furthermore, "the overbreadth doctrine does not apply to commercial speech, but may only be used as an exception to prudential standing in the context of noncommercial speech." *Bates v. State Bar of Arizona*, 433 U.S. 350, 97 S.Ct. 2691 (1977). This Court has also held similarly in *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 102 S.Ct. 1186 (1982), citing *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 100 S.Ct. 2343 (1980) and *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469, 109 S.Ct. 3028 (1989). Accordingly, under all this volume of federal, as well as Georgia authority, the Supreme Court of Georgia was correct in not extending the overbreadth doctrine to Petitioner's challenge in the instant case. This is so, both because most, if not all of the activities to be engaged in, were commercial in nature and because Petitioner lacked standing to challenge the portions of the ordinance which did not cause it an injury in fact.

Petitioner's argument is essentially that because the ordinance functions as a prior restraint on First Amendment activity, it may facially challenge the entire ordinance as overly broad and thus bypass the standing requirement. In support of this, Petitioner cites a number of cases involving First Amendment activities for the proposition that it need not have

submitted applications for sign permits in order to have standing to challenge the ordinance.

However, these cases are not helpful, both because they are distinguishable and because they oversimplify the inquiry. It is not enough for Petitioner to argue that the Supreme Court of Georgia erred because it should have allowed a facial challenge to the entire sign ordinance as a prior restraint on First Amendment activity. Petitioner must satisfy the requirement of standing regardless of how it chooses to attack the ordinance. Even if the ordinance contained provisions that amounted to a prior restraint, the only portion of the ordinance which caused the Petitioner any injury in fact was the limitation on sign height and size. The Supreme Court of Georgia correctly held these to be wholly constitutional time, place and manner regulations. Without an injury in fact, even employing the overbreadth doctrine, Petitioner lacks standing.

The first case cited by Petitioner in support of this argument is *Staub v. Baxley*, 355 U.S. 313, 78 S.Ct. 277 (1958). There, several union organizers were prosecuted by a Georgia city for violating a local ordinance prohibiting solicitation without a permit. This Court held that the Plaintiffs had standing to challenge the ordinance as an unconstitutional prior restraint on free speech because it gave the city's mayor unbridled discretion to grant or deny such a permit. *Staub* is inapposite to the case at bar, however. Even though the union organizers had never applied for a permit, they had indeed suffered an

actual injury in that they were prosecuted and convicted for violating the ordinance, thus providing the constitutional requisite for standing.

Next, Petitioner cites *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 108 S.Ct. 2138 (1988). The newspaper challenged a city ordinance required to permit newspaper vending machines on city property. Rather than apply for a permit or provoke prosecution, the newspaper launched a facial challenge to the ordinance on the basis that it granted the mayor unbridled discretion to grant or deny the permit. This Court allowed such a facial challenge, determining that the ordinance conferred unbridled discretion. Once again, however, this case is not instructive to the issue at bar because the plaintiff had suffered an actual injury as the ordinance undoubtedly proscribed its conduct.

Third, Petitioner cites *Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton*, 536 U.S. 150, 122 S.Ct. 2080 (2002). There, a Jehovah's Witnesses' organization challenged a local ordinance requiring registration prior to engaging in door-to-door solicitation.

The plaintiff established at trial that "they did not apply for a permit because they derive their authority to preach from scripture. 'For us to seek a permit from a municipality to preach we feel would almost be an insult to God.'" *Id.* at 157. The Court further noted in a footnote that:

> Although the Jehovah's Witnesses do not themselves object to a loss of anonymity, they bring this facial challenge in part on the basis of overbreadth. We may, therefore, consider the impact of this ordinance on the free speech rights of individuals who are deterred from speaking because the registration provision would require them to forgo their right to speak anonymously.

Id. at 167.

In this case as well, there is little doubt that the plaintiff received an actual injury from the portion of the ordinance they were challenging – the permit requirement. Moreover, the defendant village apparently never challenged the issue of standing, and the term "standing" is not even mentioned in the decision. Rather, the discussion in the case is almost entirely focused on the strict scrutiny analysis of the nature of the right restricted by the ordinance, the nature of the city's interest in regulating the behavior of door-to-door solicitation, and the restrictiveness of the means chosen to regulate it.

Petitioner cites a number of other U.S. Supreme Court cases which it contends are contrary to the holding of the underlying Georgia Supreme Court decision. In *Burson v. Freeman*, 504 U.S. 191, 112 S.Ct. 1846 (1992), this Court upheld a Tennessee statute outlawing solicitation for votes or engaging in campaign activities within 100 feet of a polling place as surviving strict scrutiny. The only part of the case that comes close to being relevant is Footnote 13,

which discusses the difference between a facial and as-applied challenge based on hypothetical scenarios discussed at argument. In no way does this case contradict the Georgia Supreme Court's decision in the case at bar.

Petitioner also cites *Secretary of State of Md. v. Joseph H. Munson Co. Inc.*, *supra*, as contrary to the Georgia Supreme Court decision. However, in *Munson*, this Court specifically stated that in order for the plaintiff to have standing, it was required to have suffered an actual injury. That Court allowed the facial challenge as a prior restraint because it concluded that such an injury had indeed occurred. This is completely consistent with the Georgia Supreme Court's decision in this case.

Petitioner next cites to a footnote from *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 504 n.11, 101 S.Ct. 2882 (1981). That footnote does state that this Court has "never held that one with a 'commercial interest' in speech also cannot challenge the facial validity of a statute on the grounds of its substantial infringement of the First Amendment interests of others." *Id.* However, this fails to address at all the issue of whether such a party has suffered an injury in fact so as to meet the legal requirements for standing. Further, *Metromedia*, *supra*, a plurality decision only, arose as a challenge to a city ordinance which directly regulated off-premises and other types of signage based on their content. The plaintiff had clearly suffered a direct injury from the ordinance, thus granting it standing. There is no inconsistency

between this case and the Georgia Supreme Court's decision here.

Petitioner further cites *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 112 S.Ct. 2395 (1992). There, in response to a history of racial demonstrations and counter-demonstrations, the county perceived a need to recoup the cost of police protection for such events. The county commissioners passed an ordinance which empowered the county administrator to impose permit fees for demonstrations. When the plaintiff inquired about the cost of a permit, it was quoted a fee of $100.00. The organization did not pay the fee or hold the demonstration. Instead, it filed a facial challenge to the ordinance. This Court determined that the ordinance granted unfettered discretion to the county administrator and constituted a prior restraint, thus rendering it unconstitutional. However, because the plaintiff could not hold the demonstration without paying the permit fee or risking prosecution, there was an actual injury suffered as a result of the challenged ordinance provision, thus affording standing. Once again, the Georgia Supreme Court's decision in the instant case is not inconsistent.

Another cited case is *Reno v. ACLU*, 521 U.S. 844, 117 S.Ct. 2329 (1997). That case was a challenge to the Communications Decency Act brought specifically pursuant to an expedited review portion of the Telecommunications Act of 1961, which both granted jurisdiction and allowed facial challenges to such statutes. The plaintiffs actually sought to convert the

case to an as-applied challenge, which the Court did not allow. Moreover, there were a plethora of plaintiffs involved who were challenging various provisions in the law as facially overbroad. There was really no issue regarding standing or whether any of the plaintiffs had suffered an actual injury from the provisions being challenged. *Reno* cannot be considered inconsistent with the Georgia Supreme Court's holding in this case.

City of Littleton v. Z.J. Gifts D-4, LLC, 541 U.S. 774, 124 S.Ct. 2219 (2004) is similarly inapposite. That case dealt only with the issue of whether a city adult business licensing ordinance provided adequate prompt judicial review of the denial of such a license. The case arose after an adult business opened shop in a section of the city not zoned for such a use and without applying for a license. The business preemptively brought a Section 1983 action facially challenging the city ordinance. Once again, standing was not an issue, as the ordinance clearly proscribed the plaintiff's conduct. In the end, the Court found the city's licensing criteria constitutional both as content neutral and affording adequate judicial review.

Contrary to Granite State's argument, none of the cases cited in its Petition are actually inconsistent with the decision of the Supreme Court of Georgia that it lacked standing to challenge portions of the Respondent City's ordinance that did not cause it to suffer an actual injury. Further, none of these cases provides authority for the argument that when facially challenging a statute as a prior restraint or

overbroad, the party need not comply with the requirement of standing that they actually suffer an injury resulting from the challenged statutory provision.

In *Lakewood*, *supra*, this Court also noted "[i]ndeed, if one's conduct could not be proscribed by an offensive licensing scheme, the plaintiff could not suffer an actual injury under the challenged regulations." 486 U.S. at 755-56. This perhaps serves as the best distinguishing feature between the cases cited by Petitioner and the facts of the instant case. The only actual conduct on Petitioner's part proscribed by the Roswell City Ordinance was the height and size of the proposed signs.[2] It suffered no actual injury from any other provision of the ordinance or other source of regulation. In each of the prior restraint cases cited, whether a facial or as-applied challenge, the plaintiff suffered some direct form of injury as a result of the challenged provision. There is no basis in law for

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[2] As noted above, Petitioner's argument that the Ordinance contained no "non-illusory" time limits for the City to approve or deny the application is without merit. The ordinance contained a thirty-day time limit which was fully complied with, and no delay resulted. Petitioner fails to provide any authority for its position that the time limit provision here was "illusory." In *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 110 S.Ct. 596 (1990), this Court held that a "licensor must make the decision whether to issue the license within a specified and reasonable time period during which the status quo is maintained, and there must be the possibility of prompt judicial review in the event that the license is erroneously denied." *Id.* at 228. Such was the case here.

Petitioner's argument that a party has standing to lodge a facial challenge to a prior restraint allegedly contained in a provision of the ordinance that did not apply to their conduct. On this basis, the Petition for Certiorari should be denied.

IV. CONCLUSION

Petitioner fails to meet the criteria of U.S. S.Ct. Rule 10 for review by this Court on a Writ of Certiorari. There are no compelling reasons why this Court should revisit the decision of the Supreme Court of Georgia. Despite Petitioner's arguments to the contrary, the authority it cites does not establish that the decision of the Georgia Court conflicts with the relevant decisions of this Court.

This Court's jurisprudence unequivocally states that a party must have suffered an injury in fact in order to meet the irreducible constitutional minimum for standing. The overbreadth doctrine allows this to be extended to claims that could be made by parties other than the litigant. However, nothing in the caselaw enumerating or explaining the overbreadth doctrine has allowed a party to assert standing when they have not suffered an injury by the portion of the statute that proscribed their conduct. Because Petitioner lacks the requisite link of an actual injury to assert standing in the first place, the argument that it is now asserting that portions of the ordinance never applied to it result in a prior restraint on First Amendment activities which might be asserted by

other parties is moot. Certainly, Petitioner has not been able to locate a case that has ever allowed such a convoluted form of standing or it would have argued such in its Petition. The decision of the Georgia Supreme Court that Petitioner lacked standing is entirely consistent with federal and United States Supreme Court jurisprudence, and for that reason, particularly when Granite State's nearly identical Petition was denied previously in *Clearwater*, *supra*, the instant Petition for Certiorari should be denied.

DATED, the 8th day of August, 2008.

Respectfully submitted,

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NO. 08-50

IN THE UNITED STATES SUPREME COURT

GRANITE STATE OUTDOOR ADVERTISING, INC.,

Petitioner,

v.

CITY OF ROSWELL, GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE GEORGIA SUPREME COURT

REPLY IN FURTHER SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether an individual who submits an application to engage in a First Amendment protected activity may challenge the licensing scheme as an invalid prior restraint if the application in question is denied based on unrelated grounds.

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I. THE SUBMISSION OF AN APPLICATION SHOULD NOT DEPRIVE THE APPLICANT OF STANDING TO CHALLENGE A LICENSING SCHEME.

To its credit, the City of Roswell does not dispute the fact that this Court has long found that a litigant that is subject to an ordinance has standing to challenge that ordinance on the basis that it constitutes a prior restraint on speech irrespective of whether that litigant has applied for a permit or license under the ordinance in question. *E.g.*, *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 755-56, 108 S. Ct. 2138, 2143 (1988); *Staub v. City of Baxley*, 355 U.S. 313, 322, 78 S. Ct. 277, 282 (1958). Instead, the City attempts to argue – without coming out and directly stating as much – that if a party takes the affirmative step of submitting an application for the required permit, then they can no longer challenge the constitutionality of the permitting scheme, but rather can only attack the provisions of the code that a municipality relies upon to deny the application. Of course, the City has no direct support for this argument, but it nevertheless attempts to argue that the case law relied upon by Granite State is distinguishable.

A close examination of the City's argument, however, reveals that the case law relied upon by Granite State, such as *Lakewood*, *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 112 S. Ct. 2395 (1992), and *City of Littleton v. Z.J. Gifts D-4, L.L.C.*, 541 U.S. 774, 124 S. Ct. 2219 (2004), is not distinguishable at all, but only confirms that this Court has found that an applicant such as Granite

State has standing to challenge a prior restraint of First Amendment protected activity.

Further examples of this established precedent can be seen through this Court's decision in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 110 S. Ct. 596 (1990). In *FW/PBS*, this Court considered a litigant's challenge to an adult entertainment ordinance. Before the trial court, the plaintiffs challenged the constitutionality of a new ordinance that rendered their existing stores nonconforming and required that they be closed within three years. *Dumas v. City of Dallas*, 648 F. Supp. 1061, 1067 (N.D. Tex. 1986). Even though the existing businesses already had licenses, the lower court permitted them to challenge the licensing scheme of the new ordinance, holding "[i]t is clear that a party may challenge a licensing statute regardless of whether he or she was denied a permit, or whether one has ever been sought." *Id.* After the bulk of the ordinance was upheld, including the licensing scheme, the plaintiffs appealed. *FW/PBS, Inc. v. City of Dallas*, 837 F.2d 1298 (5th Cir. 1988). On appeal, the Fifth Circuit found that the licensing scheme used by the city satisfied constitutional standards. *Id.* at 1301-04.

On appeal to this Court, the petitioners were afforded standing to challenge the licensing scheme. 493 U.S. at 223-30, 110 S. Ct. at 603-07. After finding that the plaintiffs had standing, this Court held that the licensing scheme was unconstitutional because it lacked the necessary procedural safeguards. *Id.* Even though the continued operation of the adult establishments was expressly prohibited, this Court permitted the petitioners to challenge the licensing scheme. *Id.* Thus, this Court

recognized the litigants' ability to facially challenge the permitting scheme of the new ordinance even though they already held business licenses.

Given the fact that the plaintiffs in *FW/PBS*, who already had permits, were afforded standing to challenge the licensing scheme, the fact that Granite State submitted a permit application should not have disqualified Granite State from having standing to challenge Roswell's licensing scheme. Thus, *FW/PBS* shows that Granite State should have been afforded standing to challenge the permitting provisions of the Roswell sign code.

The City's primary method of distinguishing the case law relied upon by Granite State is to assert that the ordinances at issue in those cases clearly proscribed the conduct that was at issue, whereas Roswell's permitting scheme somehow did not proscribe Granite State's proposed signs. *See* Response in Opposition, pp. 11-12, 14-15. This contention could not be further from the truth. Section 22.2 of the Roswell sign code unequivocally required prior approval from a zoning official through the issuance of a permit before any signs could be posted. Furthermore, Section 22.17(a) established a presumption that all signs were prohibited unless expressly allowed. Thus, Granite State's only options were to submit a permit application or to erect the sign without first obtaining a permit, thereby risking prosecution. Clearly Granite State's proposed conduct was proscribed by the permit requirement.

These same substantive facts were present in *Forsyth County v. Nationalist Movement*. According to Respondent, this Court found the litigant had standing there, "because the plaintiff could not hold

the demonstration without paying the permit fee or risking prosecution, there was an actual injury suffered as a result of the challenged ordinance provision." *See* Response in Opposition, p. 14. As shown above, Granite State was in the same position with respect to its proposed signs, yet the City attempts to argue Granite State does not have standing in this instance. There is simply no explanation for the inconsistency between the approach taken by this Court and the recent holding of the Georgia Supreme Court based on federal court authorities.

The City's attempt to distinguish *Lakewood* on similar grounds meets the same fate. There, the newspaper was faced with an ordinance that required a permit before engaging in protected conduct. If a permit was not obtained in advance, the publisher would face prosecution. 486 U.S. at 755-56, 108 S. Ct. at 2143. Given that Granite State was faced with this same scenario, it should have been afforded standing to challenge the permitting scheme found within the Roswell sign code. The fact that Granite State had the initiative to actually submit an application for consideration should not deprive it of the ability to challenge a constitutionally suspect licensing scheme.

Equally as unpersuasive is the City's attempt to distinguish *Littleton* on similar grounds. *See* Response in Opposition, pp. 15-16. In *Littleton*, this Court addressed the constitutionality of an adult business ordinance. 541 U.S. at 776-77, 124 S. Ct. at 2221-22. The respondent in *Littleton* had opened up an adult bookstore in a location where the city expressly prohibited such a business. 541 U.S. at 777, 124 S. Ct. at 2222. Even though the bookstore

was banned in that location, the Tenth Circuit found that the respondent had standing to challenge the licensing provisions of the ordinance. 311 F. 3d at 1226-27. After the Tenth Circuit found the permitting requirements facially unconstitutional, the city appealed to this Court. 541 U.S. at 778, 124 S. Ct. at 2222.

Although this Court reversed the decision of the Tenth Circuit and found that the ordinance did indeed provide for a prompt judicial determination, in doing so the Court afforded standing to facially challenge the judicial review provisions even though the plaintiff never applied for a permit nor sought judicial review of the citation. 541 U.S. at 777-78, 782-84, 124 S. Ct. at 2222, 2225-26. Under Roswell's logic, the only provision of the Littleton ordinance that could have been challenged would have been the subsections that rendered the adult store illegal. Instead, this Court had no issue with the litigant's standing to challenge the licensing scheme. Thus, *Littleton* makes clear that plaintiffs who suffer any harm under a regulation can facially challenge *invalid procedural provisions* that are alleged to be overbroad.

Furthermore, as this Court noted in *Littleton*, "'[t]he core policy underlying *Freedman* is that the license for a First Amendment-protected business must be issued within a reasonable period of time, because undue delay results in the unconstitutional suppression of protected speech.'" 541 U.S. at 780, 124 S. Ct. at 2224. Thus, the question is not what type of First Amendment-protected business activity the courts are considering, but whether the business for which a license is required is protected by the First Amendment. *Id.*

Signs are, of course, an expressive activity protected by the First Amendment. As this Court established in *Metromedia v. City of San Diego*, 453 U.S. 490, 501, 101 S. Ct. 2882, 2889 (1981), "Billboards are a well-established medium of communication, used to convey a broad range of different kinds of messages." *See also City of Ladue v. Gilleo*, 512 U.S. 43, 54-55, 114 S. Ct. 2038, 2045 (1994). As this Court's decisions in *Ladue* and *Metromedia* illustrate, communicating via signs and billboards is protected by the First Amendment. Thus, the City's veiled attempts to suggest that cases involving adult businesses do not apply in this context are baseless.

This Court's decision in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 122 S. Ct. 1389 (2002), further illustrates that a litigant has standing to facially challenge a prior restraint on First Amendment protected activity. In *Ashcroft*, this Court considered a facial challenge to the Child Pornography Prevention Act. *Id.* at 244, 122 S. Ct. at 1398. None of the plaintiffs had been cited under the Act or even threatened with prosecution. Nevertheless, the majority had no qualms affording the plaintiffs facial overbreadth standing. Indeed, because the plaintiffs were challenging a speech restriction they were afforded overbreadth standing and were not limited to a challenge of portions of the law that had directly injured them. The Court held:

> this case provides a textbook example of why we permit facial challenges to statutes that burden expression. With these severe penalties in force, few legitimate movie producers or book publishers, or few other speakers in any

> capacity, would risk distributing images in or near the uncertain reach of this law. The Constitution gives significant protection from overbroad laws that chill speech within the First Amendment's vast and privileged sphere. Under this principle, the CPPA is unconstitutional on its face if it prohibits a substantial amount of protected expression.

535 U.S. at 244, 122 S. Ct. at 1398-99. In *Free Speech Coalition*, the Court was forced to weigh the "possible harm to society in permitting some unprotected speech to go unpunished" versus "the possibility that protected speech of others may be muted." *Id.* at 255, 122 S. Ct. at 1399. The Court cited the overbreadth doctrine as "prohibit[ing] the Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process." *Id.* As such, overbreadth was used to strike statutory provisions without any analysis of whether they could directly have been enforced against the plaintiffs. In light of the latitude that this Court has afforded litigants who take on regulations that impact a substantial amount of protected speech, the Georgia Supreme Court's decision undermining this important facet of First Amendment jurisprudence should be addressed by this Court.

CONCLUSION

In order to engage in the First Amendment protected activity of posting signs in the City of Roswell, Granite State was faced with the options of

subjecting itself to a discretionary permitting scheme or installing a sign and facing prosecution for failure to obtain the required permit. This Court has previously afforded litigants standing to challenge permitting schemes under these circumstances. The fact that Granite State decided to submit a sign application should not change the standing analysis. Indeed, no precedent from this Court has ever established that submitting an application deprives the applicant of standing to challenge a licensing scheme. Yet this is the approach that the Georgia Supreme Court has now adopted based on the First Amendment and federal court decisions.

The Georgia Supreme Court's approach unduly threatens speech activity in Georgia and elsewhere. Therefore, Granite State respectfully requests that its Petition for Writ of Certiorari be GRANTED.

DATED this 4th day of September, 2008.

Respectfully submitted,

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